No. 93-106

IN THE SUPREME COURT OF
THE UNITED STATES
October Term, 1993

AREA INTERSTATE TRUCKING, INC.
INDIANA MATERIAL TRANSFER, INC.
ADVANCE TRANSPORTATION COMPANY,
BRYAN TRUCK LINE, INC., CHURCHILL
TRUCK LINES, INC., FRANKS & SON, INC.,
GREAT AMERICAN LINES, INC., KAT, INC.
and MOGLE ENTERPRISES, INC. on behalf
of themselves and all others
similarly situated, Petitioners,

v.

INDIANA DEPARTMENT OF REVENUE and
KENNETH L. MILLER, as Acting
Commissioner of the Indiana
Department of Revenue, Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE INDIANA TAX COURT

REPLY TO BRIEF IN OPPOSITION

James H. Hanson
Counsel of Record for Petitioners
Scopelitis, Garvin, Light & Hanson
10 West Market Street, Suite 1777
Indianapolis, IN 46204
(317) 637-1777

Michael J. Tosick
Lynne D. Lidke
Co-Counsel for Petitioners

September 14, 1993

TABLE OF CONTENTS

Page

Table of Authorities ii

I. REPLY TO RESPONDENTS' ARGUMENT IN OPPOSITION 2

A. Petitioners Do Not Challenge The Indiana Tax Court's "Construction" Of The Motor Carrier Fuel Tax 2

B. The Entire Decision In *Carmichael v. Southern Coal & Coke Co.* Is Controlling 4

C. The Motor Carrier Fuel Tax Is Proportionately Applied To All Taxpayers Except Petitioners 6

D. Petitioners Do Not Request That Rational-Basis Scrutiny Be Abandoned 8

II. CONCLUSION 9

TABLE OF AUTHORITIES

Cases

Page

American Trucking Associations, Inc. v. Scheiner, 483 U.S. 266 (1987) 8

Area Interstate Trucking, Inc. v. Indiana State Department of Revenue, Ind.App., 574 N.E.2d 311 (1991), *trans. denied* 3

Area Interstate Trucking, Inc. v. Indiana Department of State Revenue, Ind. Tax Court, 605 N.E.2d 272 (1992) . . . 3-4

Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1936) 4-5, 8

Georgia Ry. & Electric Co. v. City of Decatur, 295 U.S. 165 (1935) 5

Hooper v. Bernilillo County Assessor, 472 U.S. 612 (1985) 3-4, 9

Nordlinger v. Hahn, 112 S.Ct. 2326 (1992) 9

Road Improvement District No. 1 v. Missouri Pacific R.R., 274 U.S. 188 (1927) 5

Safeway Trails, Inc. v. Furman, 41 N.J. 467, 197 A.2d 366 (1964) *appeal dismissed, cert. denied*, 379 U.S. 14 (1964) 7-8

Williams v. Vermont, 472 U.S. 14 (1985) 3-4, 6

Wisconsin v. Mitchell, 113 S.Ct. 2194 (1993) 3

Statutes and Regulations

Page

Ind. Code Ann. § 6-6-4.1-4(a) (West Supp. 1992) 3

Ind. Code Ann. § 6-6-4.1-4.5(a) (West Supp. 1992) 3

Ind. Code Ann. § 8-9.5-8-6(c)(4) (West Supp. 1992) 8

Ind. Code Ann. § 8-9.5-8-7 (West Supp. 1992) 8

Ind. Code Ann. § 8-9.5-8-8 (West Supp. 1992) 8

Other Authorities

Sup. Ct. Rule 33.7 2

No. 93-106

IN THE SUPREME COURT OF
THE UNITED STATES
October Term, 1993

AREA INTERSTATE TRUCKING, INC.
INDIANA MATERIAL TRANSFER, INC.
ADVANCE TRANSPORTATION COMPANY,
BRYAN TRUCK LINE, INC., CHURCHILL
TRUCK LINES, INC., FRANKS & SON, INC.,
GREAT AMERICAN LINES, INC., KAT, INC.
and MOGLE ENTERPRISES, INC. on behalf
of themselves and all others
similarly situated, Petitioners,

v.

INDIANA DEPARTMENT OF REVENUE and
KENNETH L. MILLER, as Acting
Commissioner of the Indiana
Department of Revenue, Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE INDIANA TAX COURT

REPLY TO BRIEF IN OPPOSITION

Petitioners, Area Interstate Trucking, Inc., Indiana Material Transfer, Inc., Advance Transportation Company, Bryan Truck Line, Inc., Churchill Truck Lines, Inc., Franks & Son, Inc., Great American Lines, Inc., KAT, Inc. and Mogle Enterprises, Inc., on behalf of themselves and all others similarly situated, respectfully submit this Reply to Brief in Opposition and thereby reiterate their

request for a writ of certiorari on the important federal question erroneously decided by the Indiana Tax Court in this case.[1]

I.

REPLY TO RESPONDENTS' ARGUMENT IN OPPOSITION

A.

Petitioners Do Not Challenge The Indiana Tax Court's "Construction" Of The Motor Carrier Fuel Tax

Respondents erroneously contend that the Petition for Writ of Certiorari requests this Court to encroach upon the function of the Indiana Tax Court in its construction of Indiana's Motor Carrier Fuel Tax laws. Petitioners do not in fact seek such "construction" of the Motor Carrier Fuel Tax. Instead, Petitioners appropriately request an analysis of the equal protection challenge raised in this case, and this Court, as the final arbiter of Petitioners' constitutional rights, undoubtedly has jurisdiction to overturn the Indiana Tax Court's opinion.

---

[1] Respondents, in their Brief in Opposition, correctly state that the writ of certiorari should be directed to the Indiana Tax Court, not the Supreme Court of Indiana as indicated in the Petition for Writ of Certiorari, because the Indiana Tax Court is the highest appellate court in Indiana that ruled on the merits of Petitioners' case. The Office of the Clerk, pursuant to a telephone conversation dated July 21, 1993, advised Petitioners of this error in the form of their papers, but also advised Petitioners that correction of such form was unnecessary. In addition, Petitioners acknowledge that the final judgment entry of the Indiana Tax Court was inadvertently omitted from the Appendix of the Petition for Writ of Certiorari. A copy of that final judgment entry made on January 26, 1993 was forwarded to the Office of the Clerk under letter dated July 26, 1993 and is included in Respondents' Supplemental Appendix at 1. Petitioners know of no authority suggesting that such errors in form are jurisdictional, *Cf.* Sup. Ct. Rule 33.7, but nevertheless regret and apologize to the Court for their oversights.

In the proceedings below, Petitioners raised two basic contentions in their challenge to the Motor Carrier Fuel Tax. First, Petitioners argued that the Indiana Toll Road is not a "highway" as defined by Indiana statute and that, as a result, vehicular consumption of fuel in toll road operations is not a taxable event under Ind. Code Ann. §§ 6-6-4.1-4(a); -4.5(a) (West Supp. 1992) (taxing "the consumption of motor fuel by a carrier in its operations on highways in Indiana") (emphasis supplied). That contention, which sought a basic construction of Indiana's Motor Carrier Fuel Tax laws "in the sense of defining the meaning of a particular statutory word or phrase," *Wisconsin v. Mitchell*, 113 S.Ct. 2194, 1298 (1993), was rejected by the Indiana Tax Court. *Area Interstate Trucking, Inc. v. Indiana Department of State Revenue*, Ind. Tax Court, 605 N.E.2d 272, 275 (1992) (following *Area Interstate Trucking, Inc. v. Indiana State Department of Revenue*, Ind.App., 574 N.E.2d 311 (1991), *trans. denied*). Petitioners do not agree with the Indiana Tax Court's interpretation of the statutory term "highway" under Indiana law, but they do not challenge that construction by way of their Petition for Writ of Certiorari.

Instead, Petitioners seek review of the second and alternative contention advanced in the arguments below, which concedes that the Indiana Toll Road is a "highway," but then asserts that Indiana law, as applied to Petitioners, violates their right to equal protection under the U.S. Constitution. Furthermore, Petitioners do not improperly seek "construction" of state law in asking this Court to evaluate and reject the Indiana Tax Court's erroneous conclusions concerning the purpose and impact of the Motor Carrier Fuel Tax. Rather, such an analysis is a necessary ingredient to the equal protection review sought because, in any equal protection case, it is the allegedly "legitimate state purpose" and its rational connection to the distinctions drawn in legislative classifications that determine whether equal protection principles are violated. Thus, in both *Hooper v. Bernilillo County Assessor*, 472 U.S. 612 (1985) and *Williams v. Vermont*, 472 U.S. 14 (1985), for example, this Court engaged in extensive review of the purported purposes of state taxation schemes in order to determine whether those purposes justified the legislative classifications challenged by the taxpayers.

Accordingly, Respondents beg the question in their argument that this Court is constrained to accept the Indiana Tax Court's conclusion that the purpose of the Motor Carrier Fuel Tax is "simply to charge motor carriers for the use of the public roads in Indiana." *Area Interstate Trucking, supra* at 277. The properly-framed question presented by the Petition for Writ of Certiorari is as follows: If the only purpose of the Motor Carrier Fuel Tax is to charge for use of public roads, why are all taxpayers except Petitioners permitted to pay tax only when and to the actual extent they use tax-supported roads, and how does that purpose rationally support the taxation of Petitioners' toll road fuel consumption when no other taxpayer is denied the benefits of such proportionate taxation? If in answering that question this Court would be engaging in improper construction of state law, as Respondents argue, the taxation schemes struck down in *Hooper, supra*, *Williams, supra*, and other decisions of this Court would not have been subject to the Court's equal protection review in the first instance. Respondents' suggestion to the contrary is unconvincing.

B.

The Entire Decision In *Carmichael v. Southern Coal & Coke Co.*[2] Is Controlling

Respondents selectively read only portions of this Court's 1936 opinion in *Carmichael, supra*. Certainly, *Carmichael* stands for the general rule that a state tax need not be imposed in proportion to the benefits taxpayers derive from its expenditure or in proportion to the burdens the taxed activity imposes upon the state. 301 U.S. at 521-23. However, *Carmichael* also stands for the following plainly-stated proposition:

> A different question is presented when a state undertakes to levy local assessments apportioned to local benefits. In

---

[2] 301 U.S. 495 (1936).

> that case, if it fails to conform to the standard of apportionment adopted, its action is arbitrary, because there is a denial of equal protection.

Id. at 523, n. 15 (emphasis supplied). Petitioners contend that the entire *Carmichael* decision, including its proposition in footnote 15, is controlling in this litigation because the question presented is not whether Indiana must adopt a proportionate tax for the support of its roads. That question, if asked, would be answered in the negative by the general rule set forth in *Carmichael*, but it is a nonsequitur in this case. Respondents have already adopted and applied the Motor Carrier Fuel Tax proportionately, without compulsion to do so, and thus the "different question" posed in *Carmichael's* footnote 15 is the issue in this litigation.

Respondents argue that the "different question" posed in *Carmichael* is inapplicable to this case because the decisions cited in footnote 15 involved property tax assessments. *See Georgia Ry. & Electric Co. v. City of Decatur*, 295 U.S. 165 (1935); *Road Improvement District No. 1 v. Missouri Pacific R.R.*, 274 U.S. 188 (1927). The very fact that *Carmichael* cites those decisions, however, directly contradicts Respondents' position because the tax under review in *Carmichael* did not involve a property tax assessment, but rather a business tax imposed for purposes of funding a workers' compensation benefit plan. Thus, the proposition set forth in footnote 15 of *Carmichael* is just as applicable to this case as it was to the *Carmichael* analysis.

That basic proposition is as follows: Once a state undertakes the task of proportionate taxation, it must apply the standard of apportionment even-handedly and in a fashion consistent with the Equal Protection Clause of the Fourteenth Amendment. Respondents' citation to *Carmichael* for only those portions of the opinion that support their position is unpersuasive, and Petitioners urge this Court not to read *Carmichael* so selectively.

C.

The Motor Carrier Fuel Tax Is Proportionately Applied To All Taxpayers Except Petitioners

Respondents insist that the Motor Carrier Fuel Tax is not a proportionate tax unfairly applied to Petitioners because "[t]he benefits derived from the tax need not be, and in this instance are not, apportioned to the burdens of the taxpayer." *Brief in Opposition* at 11. Thus, Respondents employ a superficial theme in their attempt to avoid the important equal protection issue at hand, adopting the Indiana Tax Court's position that the Motor Carrier Fuel tax is not a proportionate tax and therefore need not be applied proportionately to Petitioners. As shown below, however, Respondents' repeated statements to that effect do not make it so.

First, Respondents attempt to prove their proposition as to the allegedly non-proportionate nature of the tax by pointing to the legislature's decision to tax toll road fuel consumption as "highway" fuel consumption. Respondents then erroneously state that other consumers of fuel not subject to taxation,[3] unlike Petitioners, "are not providing ... transportation services in operations upon Indiana public roads." *Brief in Opposition* at 11-12. What Respondents ignore, however, is the undisputed evidence in this case that many auxiliary power equipment operators do in fact engage in vehicular operations upon Indiana roads while the auxiliary power equipment is consuming fuel but are taxed only on their vehicular use of those roads. Respondents therefore attempt to create "pre-existing differences" where none exist. *See Williams, supra* at 27. There are in reality no differences between

---

[3] As previously reviewed, there has been a systematic carving out of "exemptions" to the Motor Carrier Fuel Tax over time. In its current evolutionary state, the tax is not applied to the vehicular consumption of fuel on out-of-state roads or on in-state private roads. Similarly, the tax is not applied to fuel consumed in the operation of auxiliary power equipment, such as, for example, the device that turns the drum on a ready-mix concrete truck as it moves along the roadway. *See Petition for Writ of Certiorari* at 5-6.

Petitioners and out-of-state road users, private road users, and auxiliary power equipment operators because, even though they may have other taxable fuel uses, their consumption of fuel in non-taxable activity does not "consume" or burden the roadway system supported by the tax. Thus, despite Respondents' contentions to the contrary, the fact remains that Petitioners are the only taxpayers denied proportionate taxation under Indiana's Motor Carrier Fuel Tax laws.

Second, Respondents argue that the tax is not truly proportionate in nature because Petitioners have failed to prove that every street, alley, and roadway in Indiana actually receives Motor Carrier Fuel Tax monies for its support. Petitioners need prove no such thing. What they have proven is that all of those streets and alleys in Indiana are eligible for Motor Carrier Fuel Tax support, but the Indiana Toll Road, in contradistinction, is the only public road that is not eligible for such support. In this regard, Petitioners do not challenge the legislature's decision not to fund the Indiana Toll Road with Motor Carrier Fuel Tax monies. Instead, what Petitioners challenge is taxation of toll road fuel consumption when every other taxpayer in the State of Indiana is afforded the benefits of a proportionate taxation scheme that imposes tax only when and to the actual extent the taxpayer uses the roadway system supported by the tax. Differently stated, it is not the use of tax dollars that is in question; rather, it is the assessment of those tax dollars that Petitioners challenge because the method of assessment for the Motor Carrier Fuel Tax arbitrarily excludes Petitioners from a proportionate taxation system under which all other taxpayers pay the same 27¢ per gallon for their vehicular use of the roadway system supported by the tax.

Finally, Respondents assert that taxation of toll road fuel consumption is justified by "indirect benefits" received by the Indiana Toll Road, relying upon an opinion rendered by the Supreme Court of New Jersey in *Safeway Trails, Inc. v. Furman*, 41 N.J. 467, 197 A.2d 366 (1964), *appeal dismissed, cert. denied*, 379 U.S. 14 (1964). Respondents decline to acknowledge, however, that the Indiana Toll Road cannot lawfully partake of the type of "indirect benefits" Respondents attempted to prove in the proceedings below because, under Ind. Code Ann.

§ 8-9.5-8-6(c)(4) (West Supp. 1992), the Indiana Toll Road must be self-supported and managed separate and apart from other all other Indiana roadways. *See also* Ind. Code Ann. §§ 8-9.5-8-7; -8 (West Supp. 1992). Thus, such an "indirect benefit" analysis was never relied upon by the Indiana Tax Court as a justification for taxation of toll road fuel consumption and should similarly play no part in this Court's review, particularly in light of the questionable authority cited by Respondents.[4]

In short, Respondents are unconvincing in their assertion that the Motor Carrier Fuel Tax is not proportionately applied. The Motor Carrier Fuel Tax is in fact a proportionately-applied tax except as applied to Petitioners. That is the complaint in this case, that is the basis for Petitioners' equal protection challenge, and that is the critical point of Petitioners' argument that was never meaningfully addressed by the Indiana Tax Court. Under *Carmichael, supra*, and the rational-basis scrutiny applicable to tax cases, Petitioners' challenge to the Motor Carrier Fuel Tax should be sustained.

D.

Petitioners Do Not Request That Rational-Basis Scrutiny Be Abandoned

Respondents are incorrect in their assertion that Petitioners request abandonment of the rational-basis scrutiny traditionally applied by this Court in equal protection challenges to state taxation schemes. What the Petition for Writ of Certiorari makes plain is Petitioners' contention that rational-basis scrutiny requires more thoughtful review than that afforded by the lower Indiana

---

[4] In this regard, the vast majority of the *Safeway Trails* decision is devoted to a Commerce Clause analysis, not an equal protection review, and, to the extent any of the New Jersey court's Commerce Clause analysis relates in any way to the equal protection claim advanced in this case, the analysis is suspect under the landmark U.S. Supreme Court decision in *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987).

courts and that, even under rational-basis scrutiny, modern-day systems of taxation like the Motor Carrier Fuel Tax scheme cannot be justified by superficial, talismanic analysis.

The Petition for Writ of Certiorari properly presents to this Court an opportunity to clarify to lower courts just how rational-basis scrutiny should be applied to complex taxation schemes that, necessarily, become more susceptible to abuse and misunderstanding as they become more finely-tuned in their purpose, their mechanisms for taxation, and their impact upon taxpayers. While the Court's review in complex tax cases is properly "deferential," it nevertheless still requires meaningful consideration of the "plausible policy reason" for a legislative classification that treats similarly-situated taxpayers differently. *Nordlinger v. Hahn*, 112 S.Ct. 2326, 2332 (1992). Otherwise, rational-basis scrutiny affords taxpayers virtually no relief from discriminatory and arbitrary taxation schemes that violate the basic equal protection principles long ago established by this Court. Petitioners seek a reiteration of those basic principles and are confident that, when those principles are properly applied to the facts of this case, they will prevail in their contention that the Motor Carrier Fuel Tax laws of Indiana violate their right to equal protection. Petitioners do not need "heightened" scrutiny as Respondents suggest in order to achieve that result. What is needed is a mandate to lower courts that, when a legislative classification is "[s]tripped of its asserted justifications," *Hooper, supra* at 622, and therefore cannot be rationally justified by its alleged purpose, equal protection concerns are violated. Such a showing has been made in this case and thus calls upon the Court to issue a writ of certiorari.

II.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

James H. Hanson
Counsel of Record for Petitioners
Scopelitis, Garvin, Light & Hanson
10 West Market Street, Suite 1777
Indianapolis, IN 46204
(317) 637-1777

Michael J. Tosick
Lynne D. Lidke
Co-Counsel for Petitioners

September 14, 1993